Supreme Court, U.S.
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No. _____

# In The
# Supreme Court Of The United States

SALVATORE GALLO
*Petitioner,*

v.

UNITED STATES OF AMERICA
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I. **The petitioner testified at a pretrial suppression hearing and was later indicted for perjury based on that testimony. At trial, the petitioner's credibility was impeached with evidence that he had been charged with perjury. When a defendant in a criminal case testifies at a pretrial suppression hearing, does the Due Process Clause of the Fifth Amendment preclude the Government from strategically seeking a perjury indictment for the purpose of creating impeachment material to be used against the defendant at trial, and not for the purpose of attaining a conviction on the perjury charge?**

II. **Before trial, the Government disclosed favorable "Brady" material to the defense. The district court, however, barred the evidence under Fed. R. Evid. 403 after finding that its probative value was substantially outweighed by the danger of unfair prejudice. In light of the fact that Brady material is indispensable to the defense and always prejudicial to the prosecution, does the Due Process Clause of the Fifth Amendment preclude the trial court from barring competent Brady evidence on the basis relied upon by the court?**

## LIST OF PARTIES

The Petitioner, Salvatore Gallo, was the defendant in both the United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit.

The respondent, United States of America, was the prosecution in both courts below.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Salvatore Gallo, prays that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

## OPINIONS OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Second Circuit, dated February 15, 2002, is reported at 2002 WL 243169 (2d Cir. (Conn.), and is printed in the appendix to this petition at (A-1).

The rulings of the United States District Court for the District of Connecticut, *Thompson, J.*, are unreported, but are printed in the appendix to this petition at (A-12 and A-14).

## JURISDICTION

The United States Court of Appeals entered judgment on February 15, 2002. The petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). This petition is filed within ninety days of the Court of Appeals' ruling dated February 15, 2002. 28 U.S.C. § 2101(c).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

**U.S. Const., 5th Amend.**: No person shall . . . be deprived of life, liberty, or property, without due process of law.

**18 U.S.C. § 242**: Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth,

Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both . . . .

**18 U.S.C. § 1503(a)**: Whoever corruptly . . . endeavors to influence, intimidate, or impede any grand or petit juror, . . . or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b).

**18 U.S.C. § 1623(a)**: Whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined

under this title or imprisoned not more than five years, or both.

**Fed. R. Evid. 608(b)**: "Specific instances of the conduct of a witness for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . . ."

**Fed. R. Evid. 403**: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

## STATEMENT OF THE CASE

### A. Background of Petitioner and Complainant

The petitioner, Salvatore Gallo, was a multi-decorated police officer in Hartford, Connecticut for fifteen years. He is married with three children. In contrast to the petitioner's stable family life and career, Latoya Grasser, the complainant and primary Government witness, has led a turbulent life. She is an admitted drug addict with a $250 daily habit who supported her addiction as a prostitute. Ms. Grasser has also been convicted of numerous crimes, including burglary, escape, larceny, possession of narcotics and failure to appear in court. She also admitted to lying under oath before the grand jury *in this case*.

### B. Investigation by Hartford Police Department

In 1996, the Internal Affairs Division ("IAD") of the Hartford Police Department began investigating allegations that certain Hartford police officers were "involv[ed]" with prostitutes. The investigation eventually expanded to include state and federal authorities. For approximately two years while the investigation was ongoing, however, there were no allegations that the petitioner was involved in any wrongdoing.

In August, 1998, IAD investigators spoke with Ms. Grasser about her involvement with Hartford police officers. Before they sought her

out, she had never filed a complaint against the petitioner with the IAD or anyone else. The IAD investigators interviewed Ms. Grasser inside a police car. Before interviewing her, the investigating officers had planned ahead and brought a tape recorder; they subsequently taped the interview with Ms. Grasser and later transcribed it from the tape recording. During the interview, Ms. Grasser did not identify the petitioner or accuse him of any wrongdoing.

IAD investigators interviewed Ms. Grasser again, only this time she was incarcerated. Although she had not mentioned the petitioner at her first interview, this time she named him as one of the officers who had violated her civil rights only after being shown a photo spread with his picture.[1]

When describing the petitioner, Ms. Grasser had told police that he had freckles and looked Irish. The investigating officers agreed, however, that the petitioner did not look Irish and did not have freckles. Ms. Grasser also told police that he was 25-30 years old. In reality, he was in his early 40's at the time of the alleged coercion. Furthermore,

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[1] The Government and petitioner agreed that Ms. Grasser knew the petitioner before the alleged encounters giving rise to the indictment. They had crossed paths numerous times because the petitioner patrolled the streets where Ms. Grasser plied her trade. At one point, Ms. Grasser sought refuge with the petitioner, jumping into the backseat of his cruiser because she was afraid that gang members would harm her.

Ms. Grasser told investigators that the officer who allegedly coerced her had "sandy brown hair." This description was not consistent with the petitioner's hair color, which was dark brown.

When describing the alleged encounters with the petitioner, Ms. Grasser claimed that she performed fellatio on him on two occasions. She was the only person to testify about these events. No other witness or physical evidence corroborated her story.

In April, 1999, the petitioner was summoned to a Hartford police station branch for questioning. Upon his arrival, he was interrogated in a small room by two deputized marshals who acted with FBI credentials.[2] The parties hotly disputed the substance of the interrogation. Although the marshals claimed otherwise, the petitioner denied making any incriminating statements during the interrogation. The interrogators, moreover, did not record their custodial interrogation of the petitioner, despite having recorded Ms. Grasser's interview. Nor did the interrogators offer any explanation at trial for their failure to record the interrogation. Apart from the testimony of the deputized marshals, there was absolutely no evidence, tangible or otherwise, that the petitioner made any incriminating statements while being interrogated.

The petitioner moved to suppress certain statements that his interrogators claimed he had

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[2] The marshals were actually state inspectors who had been deputized for the limited purpose of this investigation.

made. As part of his motion, he signed an affidavit and testified at a suppression hearing. After the district court denied the motion, the Government sought and obtained additional indictments for perjury in violation of 18 U.S.C. § 1503(a) and obstruction of justice in violation of 18 U.S.C. § 1623(a). The perjury charge was based on the petitioner's testimony at the suppression hearing; the obstruction of justice charge was based on his statements in the affidavit. These charges were later severed from the underlying civil rights charge, and the petitioner was tried only on the latter charge.

**C. The Trial**

Before trial on the civil rights charge, the Government disclosed certain information to the petitioner pursuant to its obligation under Brady v. Maryland, 343 U.S. 83, 83 S.Ct. 1194 (1963). Specifically, the Government produced a police report which summarized Ms. Grasser's arrest for prostitution in an entirely unrelated incident. According to the arresting officer, Norman Goddard, Ms. Grasser threatened to falsely accuse him of "sexual rape" and "criminal harassment" if he did not release her.

The Government moved *in limine* to preclude the petitioner from impeaching Ms. Grasser's credibility with evidence of her threat to falsely accuse Officer Goddard.[3] (See A-12; A-

[3] The petitioner proffered the impeachment evidence under Fed. R. Evid. 608(b), which

17). (The Government also moved *in limine* to preclude impeachment of Ms. Grasser with evidence that she had convinced her husband to marry her only after telling him that he had fathered her child, although a paternity test later revealed that he was not the father). (A-12; A-17). The Government claimed that such evidence was barred under Fed. R. Evid. 403, ostensibly because its probative value was substantially outweighed by the danger of unfair prejudice.[4] The district court granted the motion without any explanation. (A-

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provides: "[s]pecific instances of the conduct of a witness for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."

[4] Fed. R. Evid. 403 provides: "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

17). The court merely stated that "as to the motions that deal with the threat as to Officer Goddard and the claim as to paternity, those inquiries will not be permitted on cross-examination. I'm making that ruling on 403." (Id.) The court also issued an Endorsement Order, but it also contained no explanation for the exclusion of the relevant and vitally important impeachment evidence. (A-12-13). The district court simply stated:

> [t]he government's motion in limine to preclude the defendant from offering evidence of a prior threat by [Ms. Grasser] to falsely accuse a police officer of sexual misconduct . . . and the government's motion in limine to preclude the defendant from offering evidence of a prior false accusation of paternity . . . are hereby GRANTED, in part . . . . [T]he evidence should be excluded pursuant to Federal Rule of Evidence 403 during cross-examination of the witness as its probative value is substantially outweighed by the danger of unfair prejudice.

(Id.)

Although the district court ruled that Rule 403 barred impeachment of Ms. Grasser's credibility, the court allowed the Government to impeach the petitioner's credibility under Rule

608(b)[5] with evidence that he had been indicted for perjury. The court ruled that the Government could ask the following two questions: "first, did you testify in connection with another court proceeding?" and; "second, did another party give testimony in connection with that court proceeding and your version of events was found not credible?"[6] (A-14; A-29-30). The court also ruled that if Mr. Gallo "denies or equivocates," the Government could ask a follow-up question concerning whether he had been charged with perjury. (A-29).

Based on the court's ruling, the petitioner was asked the following:

Q: "You . . . had occasion in connection with another proceeding to testify under oath; isn't that correct, Officer Gallo?

A: Yes, sir.

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[5] See note 3.

[6] The court also issued an Endorsement Order, permitting the Government to "cross examine the defendant as to the fact that there was a finding in another proceeding that his testimony was not credible, but, the Government is not permitted to tie the finding to this matter unless the defendant does so first. If in the court's judgment, the defendant's response is not accurate, the government may ask a follow-up question that makes reference to the indictment for perjury." (A-14).

Q: And you testified to a version of events when you testified under oath, correct?

A: Yes.

Q: And the other party testified to a different version of events; isn't that correct, sir?

A: Yes, sir.

Q: And the finder of fact, the judge in connection with that proceeding, didn't credit your version of events, correct?

A: Yes, the motion was denied.

Q: That means your version, what you testified to, was not credited, correct?

A: It means that my attorney said the motion [to suppress] was denied. I believe that's what it means.

Q: Let me ask again. That means your version of events was not credited by the court, correct?

A: I'm not really sure because my attorney said to me that the motion was denied. So, I mean, I assume, yes, that probably what it means.

[THE GOVERNMENT]: May I have a sidebar, Your Honor?

THE COURT: You can ask a follow-up question if you like.

Q: Isn't it a fact, sir, that you were subsequently charged with perjury?

A: Yes.

(A-33-34).

The petitioner was convicted and received the maximum sentence – ten years in prison. He appealed to the United States Court of Appeals for the Second Circuit, which affirmed the conviction. (A-1).

## REASONS FOR GRANTING THE WRIT

This petition for certiorari raises two important questions of constitutional law that have not been decided by this Court. These issues are of great national significance because they are likely to arise again in countless criminal trials. A ruling from this Court will impact hundreds, perhaps thousands, of cases that are pending or will be filed in all state and federal courts.

First, the decision of the Court of Appeals permits the Government to strategically seek perjury indictments against defendants who testify at pretrial suppression hearings, not for the purpose of attaining a conviction, but simply to create impeachment material should the defendant testify at trial. The Government's manipulation of the grand jury process is inconsistent with the

fundamental purpose of the grand jury, and will constructively compel defendants to forego their constitutional right to challenge illegally seized evidence or illegally procured statements. The Government's manipulative practice is not isolated to this case, and can be expected to become more widespread.

Second, the decision below violates the Due Process Clause of the Fifth Amendment because a district court cannot exclude competent and otherwise admissible Brady evidence on the ground that its probative value is substantially outweighed by the danger of unfair prejudice. By definition, Brady evidence is highly probative and indispensable to undermining the prosecution's burden of proof. The probative value of such evidence can never be substantially outweighed by the danger of unfair prejudice.

## I. THE GOVERNMENT HAS RECENTLY ADOPTED A PRACTICE OF MANIPULATING THE GRAND JURY PROCESS BY SEEKING PERJURY INDICTMENTS AGAINST DEFENDANTS WHO PREVIOUSLY TESTIFIED IN THE SAME CASE, AND THEN USING THAT INDICTMENT TO IMPEACH THEIR TRIAL TESTIMONY

This Court has never decided an important question that is likely to arise in countless criminal cases: can the prosecution seek a perjury indictment against a defendant based on her testimony at a

pretrial hearing, and then use that indictment to impeach the defendant's credibility at trial under Fed. R. Evid. 608(b)? If the Government is permitted to manipulate the grand jury process in this manner, countless defendants will constructively lose their right to move to suppress illegally seized evidence and illegally obtained custodial statements.

"The basic purpose of the . . . grand jury [is] to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes." Costello v. United States, 350 U.S. 359, 362, 76 S.Ct. 406 (1955). "The scope of the grand jury's powers reflects its special role in insuring fair and effective law enforcement." United States v. Calandra, 414 U.S. 338, 343, 94 S.Ct. 613 (1974). "[T]he grand jury is not meant to be the private tool of the prosecutor," United States v. Fischer, 455 F.2d 1101, 1105 (2d Cir. 1972) (use of grand jury to "freeze" testimony of co-conspirator was improper), but rather serves as a "protector of citizens against arbitrary and oppressive governmental action." Calandra, 414 U.S. at 343. Consequently, "[i]t is, of course, improper for the Government to use the grand jury for the sole or dominant purpose of preparing for trial under a pending indictment." United States v. Leung, 40 F.3d 577, 581 (2d Cir. 1994).

While these principles are usually applied to claims that the grand jury has been used to obtain evidence for a pending trial, the abuse is greater when the grand jury is used, as here, to bring a new charge for the purpose of influencing the trial of the

underlying charge. In such a case, where the charging decision does not spring from "the prosecutor's normal assessment of the societal interest in prosecution," United States v. Goodwin, 457 U.S. 368, 380 n.11, 102 S.Ct. 2485 n.11 (1982), but from the desire to gain a tactical advantage at trial, the prosecutor abuses the discretion vested in her to decide what charges to bring before a grand jury. See generally United States v. LaPorta, 46 F.3d 152, 161 (2d Cir. 1994).

The perjury indictment in this case was not brought by the Government in a genuine effort to faithfully uphold the law. Rather, it was brought to gain an advantage in securing a conviction at the trial of the civil rights charge. The purpose and effect of the perjury and obstruction indictments were to create impeachment evidence against the petitioner should he testify at trial. Such a sporting use of the criminal justice system cannot co-exist with the commitment to fairness grounded in the Due Process Clause of the Fifth Amendment.

At oral argument before the Second Circuit, the panel identified the problem created by the Government's use of the perjury indictment to impeach the petitioner. The relevant exchange between the court and the Government was as follows:

Judge Sotomayor: It does seem rather odd indeed to be able to bring a charge and then cross examine on something you chose to do; there's no conviction; there's no anything . . .

Judge Pooler: . . . To this day there's no conviction.

The Government: That's correct your honor.

Judge Sotomayor: I mean, *what keeps the Government from doing this routinely every time a defendant says he or she is going to testify*? [Emphasis added].

The Government: *That could be a concern*, your honor, but here the concern isn't present based upon the facts of this case. [Emphasis added].

Judge Sotomayor: But you could have, assuming the judge had permitted, as he did, a cross examination as to what his ruling was, that's substantially different than a cross examination about a perjury charge that you in your discretion have chosen to bring. *You've created the impeachment material*. [Emphasis added].

The Government: Well, the Government . . .

Judge Sotomayor: . . . Not the defendant, *you created it by charging him*. [Emphasis added].

The Government: Well it wasn't the Government's intention to create impeachment material in this case, and what the district court did, and it's an abuse of discretion standard your honors; what the district court did, he carefully considered the issue – "I'm not going to allow you to do it.

What you can do is you can ask, consistent with Bagaric,[7] whether there was a finding in another proceeding, by another . . ."

Judge Sotomayor: . . . Your adversary is right; he asked him that question, he said "yes, my motion was denied," and then you followed up and he became a little more equivocal, so I'm not sure why you weren't bound by the first "yes."

The Government then responded that the allegedly equivocal nature of the petitioner's answers entitled the Government to follow-up by asking whether he had been indicted for perjury.[8]

Though the Government admitted that the use of indictments to impeach credibility "could be a concern, the United States Attorney's Office has apparently adopted a policy of seeking such indictments. (See A-39-44, (Jim Dwyer and William K. Rashbaum, *Officer Faces New Charges in Torture Case*, N.Y. TIMES, March 26, 2002,

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[7] United States v. Bagaric, 706 F.2d 42 (2d Cir.), cert. denied, 464 U.S. 840 (1983).

[8] The summary of the oral argument contained in this petition is taken from the tape of oral argument which was purchased by the petitioner. The petitioner was instructed by the Clerk's Office at the United States Supreme Court that a written summary of the oral argument was sufficient, without the need to submit the actual tape. Should the Court require the tape, the petitioner will provide a copy.

Metro Section)). In the widely publicized "Abner Louima case," Officer Charles Schwarz was convicted in 1999 of violating Mr. Louima's civil rights after the jury rejected his testimony. Following his conviction, the Government did not immediately seek any additional indictments, although it certainly could have done so. More than three years later, however, the United States Court of Appeals for the Second Circuit reversed the conviction and remanded for a new trial. United States v. Schwarz, 283 F.3d 76 (2002). Only then did the Government seek an additional two-count indictment against Officer Schwarz for perjury based on his trial testimony.[9] (A-39-44).

If Officer Schwarz testifies at his upcoming second trial, the Government will now be able to impeach him by asking whether he is under indictment for perjury, just as it did at the petitioner's trial. The adverse consequences of this question and an affirmative response cannot be underestimated, for when credibility is in issue, "perjury" is a hot-button word. Jurors will be reluctant to believe a witness currently testifying under oath when the witness reveals that she has already been formally charged with lying under oath in a similar proceeding. This natural suspicion is compounded when the jury considers a

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[9] Each count of the new indictment was based on Officer Schwarz's denials that he had taken Mr. Louima away from a desk area at the stationhouse, and that he had been in the stationhouse bathroom with Mr. Louima. (See A-41-42).

defendant's vested interest in the outcome. The Government astutely recognizes this, and therefore seeks indictments even where it does not intend to prosecute. This Machiavellian practice is not consistent with the due process guarantees embodied in the Fifth Amendment.

The grand jury process and criminal statutes were certainly not designed as instruments of intimidation. The potential for abuse is readily apparent, and the far-reaching consequences of this practice cannot be underestimated. The Louima case has received national attention; any prosecutor who did not think to use this strategic tool before will certainly do so now.

If the Government can use the grand jury to gain a tactical advantage at trial, it would call to mind Judge Jerome Frank's statement many years ago, referring in dissent to an opinion excusing as harmless error a prosecutor's improper appeal to jury prejudice in wartime:

> If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise, it will be as if we declared in effect, "Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules. If prosecutors win verdicts as a result of 'disapproved' remarks, we will not deprive them of their victories; we will merely go

> through the form of expressing displeasure. The deprecatory words we use in our opinions on such occasions are purely ceremonial."

United States v. Antonelli Fireworks Co., 155 F.2d 631, 661 (2d Cir. 1946) (Frank J., dissenting); see also United States v. Borello, 766 F.2d 46, 57-58 (2d Cir. 1985), quoting Antonelli. So too here, the principle that "[i]t is, of course, improper for the Government to use the grand jury for the sole or dominant purpose of preparing for trial under a pending indictment" would be a "pretend-rule" and its declaration "purely ceremonial," if such steps are tolerated.

Interestingly enough, on March 15, 2002, after the United States Court of Appeals for the Second Circuit had affirmed the petitioner's conviction, the Government, on its own motion, moved to dismiss the pending perjury and obstruction of justice indictments. (A-35). Were these indictments purely ceremonial? This Court should grant the petition for certiorari to determine whether prosecutors across the nation will be permitted to impeach countless testifying defendants with the fact that they were indicted for perjury after testifying at a pretrial hearing.

## II. A TRIAL COURT CANNOT EXCLUDE PROBATIVE AND OTHERWISE ADMISSIBLE BRADY EVIDENCE ON THE GROUND THAT ITS PROBATIVE VALUE IS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE

This Court has never decided an important question that is likely to arise in countless criminal trials: whether a trial judge can bar exculpatory or favorable "Brady" evidence on the ground that its probative value is substantially outweighed by the danger of unfair prejudice under Fed. R. Evid. 403. Unlike most Brady cases, which arise from the prosecution's failure to disclose allegedly exculpatory or favorable information,[10] the Government met its Brady obligation in this case. The problem arises because the district court barred this crucial evidence after concluding that its probative value was substantially outweighed by the danger of unfair prejudice.

It is well-settled that defendants in criminal cases are entitled to the disclosure of exculpatory or favorable evidence. Brady, 343 U.S. at 87; Bagley, 473 U.S. at 674. A defendant's right to favorable evidence "trace[s] its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court's

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[10] See, e.g., Brady, 343 U.S. 83, 83 S.Ct. 1194 (1963); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985); Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995).

decision in [Brady.]" Kyles, 514 U.S. at 432. Brady's doctrinal foundation stems from the due process guarantee that a defendant be permitted to proffer evidence that casts material doubt upon her guilt in order to prevent the miscarriage of justice. Bagley, 473 U.S. at 674. These principles recognize that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038 (1973). The exclusion of competent Brady evidence proffered by the defendant is unquestionably an issue of constitutional dimension. Kyles v. Whitley, 514 U.S. 419, 432, 115 S.Ct. 1155 (1995) (noting "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment . . . .") (quoting Brady, 373 U.S. at 87).

The fundamental importance of Brady material to the defense means that its probative value can never be substantially outweighed by the danger of unfair prejudice. To hold otherwise would legitimize a court's exclusion of Brady material even where the prosecution's failure to disclose the very same material would have constituted a Brady violation. There is no practical difference between prosecutorial non-disclosure, and exclusion by the Court after weighing probative value versus prejudicial effect. In both cases, the defendant is unable to use competent favorable

evidence.[11] It was, therefore, as much a violation of due process for the court to exclude the Brady material in this case as it would have been for the Government to withhold it.

This Court has repeatedly affirmed the principle that Brady evidence is so vitally important to the fairness of a criminal trial, that the Government has an affirmative obligation to disclose it to the defendant even if the defendant does not request it. See, e.g., Kyles, 519 U.S. at 433. This rule represents the Court's implicit recognition that Brady material is highly probative in the search for truth at trial. Moreover, Brady material, by definition, necessarily prejudices the prosecution. Prosecutors can always be expected to argue that the evidence should be barred under Rule 403 (or its state equivalent). To permit the exclusion of otherwise admissible Brady evidence on this basis would turn Brady on its head, affecting innumerable criminal trials where Brady material is proffered by the defendant. Certiorari should be granted to determine whether evidence can ever be substantially more prejudicial than probative when it was disclosed pursuant to a constitutional obligation that was adopted to ensure fairness.

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[11] The competency of the evidence in this case distinguishes it from other scenarios where the evidence is inadmissible because, for example, it constitutes hearsay.

## CONCLUSION

This petition raises two issues that trial courts all over the nation will have to grapple with in the future. By granting the petition, the Court can provide trial courts with the necessary guidance when addressing these issues.

For all the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully Submitted
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No. _____

**IN THE**
**Supreme Court Of The United States**

SALVATORE GALLO
*Petitioner,*

v.

UNITED STATES OF AMERICA
*Respondent.*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

**APPENDIX**

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UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA

(Argued: February 7, 2002 Decided: February 15, 2002)

Docket No. 01-1052

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UNITED STATES of America,

Prosecution-Appellee,

v.

Salvatore GALLO,

Defendant – Appellant.

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Appeal from the United States District Court for the District of Connecticut, Alvin W. Thompson, Judge.

James A. Wade; Jeffrey C. Kestenband, on the brief, Hartford, CT, for Appellant.

James J. Finnerty, III; John A. Danaher, III, United States Attorney, James I. Glasser, on the brief, New Haven, CT, for Appellee.

Present: ROSEMARY S. POOLER, SONIA SOTOMAYOR, Circuit Judges, and NICHOLAS G. GARAUFIS, District Judge. [FN*]

FN* The Honorable Nicholas G. Garaufis, United States District Court Judge for the Eastern District of New York, sitting by designation.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of said District Court be and it hereby is AFFIRMED.

Defendant-appellant Salvatore Gallo appeals from the January 12, 2001 judgment of the United States District Court for the District of Connecticut (Alvin W. Thompson, Judge), convicting him after a jury trial of one count of deprivation of civil rights under

color of law, in violation of 18 U.S.C. § 242. The district court sentenced Gallo principally to 120 months imprisonment.

A federal grand jury returned a one count indictment against Gallo on June 3, 1999, and later returned a superseding three count indictment on May 4, 2000. A jury found Gallo guilty of count three, deprivation of civil rights under color of law. (Counts one and two, obstruction of justice and making false material declarations, in violation of 18 U.S.C. § 1503(a) and 18 U.S.C. § 1623(a), respectively, were severed and remain pending.)

The evidence at trial showed that Gallo, a Hartford, Connecticut police officer, while in uniform and on duty, twice coerced the complainant, Latoya Grasser, into engaging in sexual acts under threat of arrest. In support of its case, the government offered, inter alia, the testimony of Grasser, who described the two incidents, the testimony of another woman who stated that Gallo had made a similar attempt to coerce her, and the testimony of three investigating officers, who described their investigation and recounted several incriminating statements Gallo made during an interview prior to his indictment. (Prior to trial, Gallo moved to suppress the statements he made in the interview. In support of his motion, Gallo submitted an affidavit and testified. The court denied his motion, finding his testimony not credible. His affidavit and testimony were the impetus for the government indicting Gallo on the additional counts of

obstruction of justice and making false material declarations.) In support of his defense, Gallo testified, denying the allegations, contesting the investigators' description of his interview, and denying that he made any of the incriminating statements. He also cross examined all of the government witnesses and questioned both their recollections and their credibility. Gallo raises six claims on appeal, five stemming from evidentiary rulings and one challenging his sentence as illegal.

First, Gallo argues that the court erred in granting the government's in limine motion to prohibit the defense from entering, pursuant to Fed. R. Evid. 608(b), evidence of two specific instances of conduct for the purpose of attacking Grasser's credibility. The defense intended to introduce evidence that (1) Grasser had previously threatened another officer that she would accuse him of "criminal harassment" and "sexual rape," and (2) she convinced her husband to marry her by telling him he was the father of her child, which was not true. The trial court excluded the evidence as unfairly prejudicial under R. 403. Gallo argues that Grasser's credibility was the main issue at trial and that the court erred in excluding this credibility evidence because the evidence was highly probative and because the court did not explain why it found the evidence unfairly prejudicial.

We review all of Gallo's claims that the court erred in making evidentiary rulings for abuse of discretion. See United States v. Dwyer, 539 F.2d

924, 927 (2d Cir. 1976). While it is obviously more helpful when the district court provides a clear analysis of the 403 factors, see id. at 927–28, it is not required to do so explicitly where, as here, it is evident from the record that the court conducted the necessary balance. See United States v. Pitre, 960 F.2d 1112, 1120 (2d Cir. 1992) ("[W]here the issues of both the probative value and possible prejudice effect of admitting prior act evidence are presented to the district court when it makes its decision to admit such evidence, a mechanical recitation of the Rule 403 analysis is not required.") Here, the record reflects that the court considered both the defense's arguments for admitting evidence as proper credibility evidence under R. 608 and as highly probative under R. 403 and the government's arguments against admitting the evidence as unreliable and prejudicial. The court made a ruling after considering the oral arguments of the parties and reviewing the submitted legal briefs. The court clearly considered the admissibility of the evidence, under 608(b) and 403, and made a determination that, unless used to rebut certain evidence submitted by the government, the evidence was unfairly prejudicial. We find the court did not abuse its discretion in so ruling.

Second, Gallo argues the that the court erred in granting the government's in limine motion that, "If a material component of the defendant's cross-examination of [Grasser] is a specific attack on her credibility, such as a suggestion that she has fabricated her testimony against the defendant or

that she is biased because she is receiving a benefit for her cooperation or testimony," then the government could rehabilitate Grasser's credibility by eliciting her testimony that other police officer defendants pleaded guilty after Grasser accused them. The court restricted this rehabilitation to "the extent the evidence is a direct response to a specific attack on the witness's credibility," and further ruled that it would also give a limiting instruction on the testimony. Gallo argues this ruling was erroneous not only under Rule 608(b), but also under the Fifth and Sixth Amendments, and that, because of the erroneous ruling, it did not vigorously attack Grasser's credibility. We find that the court's ruling is consistent with both evidentiary rules and constitutional requirements. Had Gallo initiated a specific attack on Grasser's credibility, suggesting she fabricated her allegation, the government was entitled rehabilitate her credibility by eliciting testimony from her that her similar accusations against two other officers resulted in their guilty pleas. See United States v. Martinez, 775 F.2d 31, 34, 36-38 (2d Cir. 1985) (affirming admissibility of witness's testimony that two other guards pleaded guilty in response to his accusations to rebut defense's attack on his credibility, suggesting he made false accusations); see also United States v. Lindemann, 85 F.3d 1232, 1242-44 (7th Cir.1996) (affirming testimony that others pleaded guilty in response to witness's accusations to rebut defense's attack on witness as biased). But see United States v. Taylor, 900 F.2d 779, 781 (4th Cir.1990). The court did not abuse its

discretion in finding this evidence sufficiently probative and ruling it admissible. Furthermore, we note that defense counsel did cross examine Grasser about her inconsistent physical description of Gallo, her drug habit, her criminal record, her use of false names, and her inconsistent grand jury testimony, all of which served to undermine her overall credibility.

Third, Gallo argues that the court violated his due process rights by granting the government's in limine motion that, if Gallo called character witnesses, the government could ask them if they were aware that Gallo had been indicted for perjury. Gallo claims this ruling was erroneous because it referred to an adverse consequence of the same conduct for which he was already on trial. Gallo asserts that, as a result of the court's ruling, he declined to call character witnesses. As an initial matter, we note that it does not appear that the defendant properly preserved this objection for appeal. Although the court gave its initial thoughts on the admissibility of the testimony, the record clearly shows that the court never made a ruling on the subject, apparently because the defense negated the need for a ruling by stating it was not calling character witnesses. However, even assuming Gallo had preserved this issue, we find no error in the court's tentative ruling. Committing an act and then lying about the commission of the act are two separate incidents of misconduct. Gallo's indictment for perjury was not a consequence of the same conduct for which he was on trial—the

deprivation of a civil right. The perjury indictment was a consequence of Gallo's *lying about* the deprivation of a civil right. Thus, although it is a fine distinction, the two acts are separate acts, and the government was entitled to ask character witnesses whether they were aware of the separate act. Cf. United States v. Bush, 58 F.3d 482, 488-90 (9th Cir. 1995).

Next, Gallo argues that the court erred in ruling that, "The government may cross examine the defendant as to the fact that there was a finding in another proceeding that his testimony was not credible, but, the government is not permitted to tie the finding to this matter unless the defendant does so first." Based on this ruling, the government, after asking the defendant if he had testified in another court proceeding, asked, "And the finder of fact, the judge in connection with that proceeding, didn't credit your version of events, correct?" After the defendant equivocated in his answer, and the court allowed the government to ask the question, "Isn't it a fact, sir, that you were subsequently charged with perjury?" Gallo argues this line of questioning violated R. 608(b) in that it improperly impeached the defendant with extrinsic evidence—in this case, the evidence of a third party's conclusions as to Gallo's conduct. Rule 608(b) specifically allows the questioning of a witness about specific instances of conduct to attack the witness's credibility. Asking the witness about a specific instance of conduct other than the one for which he is on trial for the purpose of attacking his

credibility is not extrinsic evidence. Had Gallo denied the perjury charge and had the government attempted to introduce the indictment, that would constitute extrinsic evidence. Simply asking the defendant the question is not extrinsic evidence. Thus, the questioning was not improper under R. 608, and the court did not abuse its discretion. See United States v. Bagaric, 706 F.2d 42, 65 (2d Cir. 1983), abrogated on other grounds by National Organization for Women, Inc. v. Scheidler, 510 U.S. 249 (1994).

Fifth, Gallo argues that, considered together, the court's evidentiary rulings were so inherently inconsistent as to deny him his due process right to a fair trial. The defendant argues that the court's rulings (1) were inconsistent under R. 403 in that the court admitted the government's evidence of Gallo's perjury indictment as probative, but excluded the defense's evidence of Grasser's false threat against another officer and false paternity accusation as unfairly prejudicial; and (2) were inconsistent under R. 404(b) in that the court admitted the government's evidence of another woman's testimony that Gallo threatened her, but excluded the defense's evidence that Grasser falsely threatened another officer. Essentially, Gallo argues that if the court admitted the government's 404(b) evidence, it had to admit the defense's 404(b) evidence, and likewise with the 403 evidence. Gallo argues that the evidence the court prohibited the defense from admitting was more probative and less inflammatory than the evidence it

allowed the government to admit and that, as a criminal defendant, he is entitled to greater protection against prejudicial evidence. Gallo's argument is without merit. The fact that two separate pieces of evidence were offered under the same evidentiary theory does not mean that the court must admit both or exclude both. The court properly considered the admissibility of each piece of evidence and analyzed it according to the proffered theory of admission. Considered as a whole, the court's evidentiary rulings were not unfair or biased against the defendant, and they did not violate his right to due process or to confront his accuser. We find no abuse of discretion.

Furthermore, as to all of Gallo's evidentiary challenges, we note that a trial court has broad discretion in making evidentiary rulings, particularly in a case such as this where the main issue is credibility. We find that the trial court did not abuse its discretion. In addition, the evidence against Gallo was substantial, and, assuming arguendo, that the court erred in a ruling, any error was harmless.

Finally, Gallo argues that the court imposed an illegal sentence by punishing Gallo for exercising his constitutional right to go to trial. Gallo bases this argument on some of the court's comments during sentencing, which noted the plea agreement the government proposed, on the fact that he received a longer sentence than another officer who pled guilty in a case involving worse conduct, and

on the fact that the court sentenced him to the statutory maximum, which Gallo argues is an excessively harsh sentence. Gallo's arguments are completely without merit. First, the court's comments, read in the context of the entire sentencing proceeding, do not evidence vindictiveness or suggest that the court was punishing Gallo because he did not plead guilty. In fact, it appears that the only reason the court had occasion to comment on the proposed plea agreement was because the defense insisted, over government objection, that the fact that the government had once offered Gallo a lenient plea bargain was relevant to determining the length of his sentence after being found guilty by a jury. Clearly, it is not, and the court did not act improperly by responding to this issue raised by the defense. Second, any disparity between Gallo's sentence and the sentence of another individual is irrelevant for purposes of demonstrating an unconstitutional sentence. See United States v. Rooney, 866 F.2d 28, 33 (2d Cir. 1989). Finally, the court's sentence was entirely in accordance with the Guidelines and with the statute. Gallo's conviction resulted in a sentencing range of 210 to 262 months. Because the statutory maximum for the offense is 120 months, the court properly sentenced Gallo to 120 months. *See* U.S.S.G. § 5G1.1(a).

We find all of Gallo's remaining arguments to be without merit.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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| UNITED STATES OF AMERICA | : | |
| V. | : | Crim. No. 3:00CR100 (AWT) |
| SALVATORE GALLO | : | |

ENDORSEMENT ORDER RE:
MOTION IN LIMINE

The government's motion in limine to preclude the defendant from offering evidence of a prior threat by L.L.G. to falsely accuse a police officer of sexual misconduct, [Doc. # 26] and the government's motion in limine to preclude the defendant from offering evidence of a prior false accusation of paternity [Doc. # 38] are hereby GRANTED, in part.

As to Federal Rule of Evidence 412(a), the court concludes that in each instance the evidence is not being "offered to prove the alleged victim's sexual predisposition", Fed. R. Evid. 412(a)(2); the court also concludes that the evidence does "not directly refer to sexual activities or thoughts", and it is not being offered because "'the proponent believes [that it] may have a sexual connotation for the

factfinder." Fed. R. Evid. 412(a)(2), Adv. Comm. Notes. However, the evidence should be excluded pursuant to Federal Rule of Evidence 403 during cross-examination of the witness as its probative value is substantially outweighed by the danger of unfair prejudice. The court notes, however, that it has granted the government's motion in limine [Doc. # 27] concerning the admission of evidence to rebut a specific attack on the witness's credibility. If the evidence that is the subject of that motion in limine is offered by the government, that will change the balance under Rule 403 and the defendant will be permitted to question the witness as to the matters that are the subject of the instant motions in limine [Doc. # 26 and Doc. #38], subject, as requested by the government, to the limitations of Rule 608(b).

It is so ordered.

Dated this 24th day of October, 2000, at Hartford, Connecticut.

s/_____
Alvin W. Thompson
United States District Judge

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| UNITED STATES OF AMERICA | : | |
| V. | : | Crim. No. 3:00CR100 (AWT) |
| SALVATORE GALLO | : | |

ENDORSEMENT ORDER RE:
MOTION IN LIMINE

The government's motion in limine concerning the cross examination of the defendant [Doc. #37] was GRANTED, in part, pursuant to Federal Rules of Evidence 608(b) and 403, on the record today. The government may cross examine the defendant as to the fact that there was a finding in another proceeding that his testimony was not credible, but, the government is not permitted to tie the finding to this matter unless the defendant does so first. If in the court's judgment, the defendant's response is not accurate, the government may ask a follow-up question that makes reference to the indictment for perjury.

It is so ordered.

Dated this 25th day of October 2000, at Hartford, Connecticut.

s/_____
Alvin W. Thompson
United States District Judge

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| UNITED STATES OF AMERICA | : | |
| V. | : | Crim. No. 3:00CR100 (AWT) |
| SALVATORE GALLO | : | |

JURY TRIAL
Volume I

BEFORE:

**HON. ALVIN W. THOMPSON, U.S.D.J.**
and a jury of twelve

APPEARANCES:

FOR THE GOVERNMENT:

OFFICE OF THE UNITED STATES ATTORNEY
157 Church Street
New Haven, Connecticut 06510

FOR THE DEFENDANT:

TIMOTHY F. McNAMARA, ESQ.
102 Oak Street
Hartford, Connecticut 06106

THE COURT: Please be seated. Hopefully counsel got a copy of a list of rulings on all the arrests and convictions. I'm going to take mine and highlight what's not admitted and what is so I can keep it straight.

So also I sent out word that as to the motions that deal with the threat as to Officer Goddard and the claim as to paternity, those inquiries will not be permitted on cross-examination. I'm making that ruling on 403.

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| UNITED STATES OF AMERICA | : | |
| V. | : | Crim. No. 3:00CR100 (AWT) |
| SALVATORE GALLO | : | |

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JURY TRIAL
Volume II

BEFORE:

**HON. ALVIN W. THOMPSON, U.S.D.J.**
and a jury of twelve

APPEARANCES:

FOR THE GOVERNMENT:

OFFICE OF THE UNITED STATES ATTORNEY
157 Church Street
New Haven, Connecticut 06510

FOR THE DEFENDANT:

TIMOTHY F. McNAMARA, ESQ.
102 Oak Street
Hartford, Connecticut 06106

MR. McNAMARA: Your Honor, I think this would be a good time for me to break my questioning to meet the schedule. I have other questions.

THE COURT: I understand. Why don't we give the jury our 11 o'clock break. We'll probably give you an extra ten minutes, so you can come back at 11:40.

(Whereupon the jury left the courtroom.)

THE COURT: Why don't we take a few minutes and review the issues we discussed this morning.

Why don't we first talk about the motion concerning the cross-examination of the defendant. Why don't you pin down exactly what the scope of the question would be, Mr. Glasser. And then if Mr. McNamara wants to make an objection, he can.

MR. GLASSER: Thank you, Your Honor.

As Your Honor knows, by motion we proposed cross-examining the defendant with respect to his -- the fact that he had been indicted for perjury. We proposed to cross-examine the defendant with respect to the fact that he's been indicted for obstruction of justice. I also intend to cross-examine the defendant -- by the way, that was the proposal. Based on an earlier conference with counsel and with the Court in chambers, I modified

that to indicate that I would ask the defendant whether or not he was charged with perjury, whether or not he was charged, to eliminate any issues with respect to indictments. I also intend to inquire of Mr. Gallo whether or not he testified in connection with the court proceeding on a previous occasion and his testimony was not credited by the trier of fact.

THE COURT: And I think you were going to say "on another occasion."

MR. GLASSER: Yes, Your Honor.

THE COURT: "In another proceeding."

MR. GLASSER: That's correct, Your Honor.

And finally, Your Honor, I'm going to inquire as the prior disciplinary. Those are the four areas.

THE COURT: The only additional question that has occurred to me since we talked this morning is, even though the question would be phrased in terms of "charged with perjury" and "charged with obstruction of justice," because we're going to be generic in terms of referencing the matter, I don't remember all the details of this, so I'm really asking a question: Is that cumulative? Are we asking about the very same thing three times? The obstruction and the perjury charges are

certainly related to the same conduct. Are there three things or are there two or one, is really what I'm driving at.

MR. GLASSER: Yeah. They flow, obviously, from the same event. For purposes of legal definition, they're very different or they've got a different object, obviously. For this purpose, I would agree with Your Honor that I can certainly conflate the perjury and obstruction of justice to one question, eliminate the obstruction of justice would be my intention.

THE COURT: If we -- even if you do that, do we have the impression left with the jury that there were two proceedings in which he was either found not credible or out of which a perjury charge arose when in fact there was only one?

MR. GLASSER: I understand Your Honor's concern.

THE COURT: Does that leave an un -- or potentially unfair impression?

MR. GLASSER: I can see where it might, Your Honor. And I would concede that the government probably ought to do it only once.

THE COURT: Okay.

MR. GLASSER: I would take that position.

THE COURT: Mr. McNamara, given that as your starting point, I'm interested in your position.

MR. McNAMARA: Your Honor, my position remains the same. How do I reexamine on those questions, Your Honor?

First of all, as the Court has appropriately noted, a charge -- you told this to the jury as to what an indictment was -- is merely a charge.

THE COURT: I think Mr. Glasser is going to collapse it all down into one and it will be -- I most likely -- I made an assumption, maybe I should ask him how he's going to collapse it into one.

MR. GLASSER: What I would propose doing is asking the following questions: "Did you testify in connection with an earlier proceeding?" "Yes." "Was your testimony -- isn't it a fact that your testimony was determined not to be credible? As a result of that weren't you charged with perjury?" And leave it.

MR. McNAMARA: Your Honor, he's talking about your decision.

THE COURT: Let's take the first part of the question. Before you get to "were you charged with perjury," what's your objection to that?

MR. McNAMARA: It is, Your Honor, that simply because somebody is charged is not probative at all.

THE COURT: We haven't gotten that far yet. We have "found not credible in a court proceeding." Do you have an objection to that part?

MR. McNAMARA: Absolutely, Your Honor.

THE COURT: And what's your objection to that?

MR. McNAMARA: My objection is that obviously -- if I understand, I was not present at the hearing before Your Honor --

THE COURT: Well, there's a written ruling and I think that addresses everything.

MR. McNAMARA: Whether or not the Court found that Mr. Gallo's testimony was not credible or whether or not it established -- or whether or not his testimony established a claim can often be two different things, especially with the law.

Excuse me for just a moment here.

(Pause)

THE COURT: Let me tell you how I'm approaching this, Mr. McNamara. The rule says that such instances of conduct may be inquired into on cross-examination of the witness. So how is this not covered by the rule? And it's within the discretion of the court if probative of truthfulness or untruthfulness.

MR. McNAMARA: The problem for me is, Your Honor, that, as I understand it, although Your Honor made findings of fact in your decision as to the motions that we're speaking of, they don't necessarily need be findings that therefore say "I find Mr. Gallo not credible." And I know nothing -- and I must say I was not present at that time as Your Honor knows, but I do not find anything within Your Honor's decision in which Your Honor found that Mr. Gallo was not credible.

THE COURT: Well, I think the findings of fact speak for themselves. And I don't make it my practice to -- I made my findings of fact and there was a direct -- well, the versions of the events were directly in contradiction to each other.

MR. McNAMARA: I understand that, Your Honor. The difficulty I have is the question is going to be asked of Officer Gallo in that element were you found not to be credible. I think that's basically what Mr. Glasser wants to ask. What is his answer supposed to be, "Yes, I was found to be not credible"?

THE COURT: I can't give him the answer.

MR. McNAMARA: I can't give it either, Your Honor. That's one of my problems.

The other thing, Your Honor, I think if that's what we go into, I have a right to go into who made that finding. Your Honor, I don't want to go into that. Obviously it's highly prejudicial to my client to be caused -- everybody respects you anyhow, but particularly a jury always has a great respect for the judge, as we all know. Mas o menos as far as the lawyers are concerned. And I think it is so prejudicial. How will I effectively cross-examine? I don't know how I can. Obviously I'd be a fool to get involved with the fact that you were involved. Now, if it were another judge, maybe. I don't know that. But there's no way in what was being proposed to Your Honor that I can do any effective cross-examine. None. And I think it is explosively harmful.

MR. GLASSER: Your Honor, if I could --

THE COURT: I have -- the problem I have with your argument, Mr. McNamara, it doesn't address the provisions of the rule insofar as it relates to you're making a 403 argument, I don't think that the probative value is substantially outweighed by the prejudicial effect insofar as we're talking about the first part of Mr. Glasser's proposed question. I'm going to allow that part. I'm still thinking about the question in terms of the -

- we're talking about "charged with perjury." Where I'm still concerned there is that -- I view this as different from the situation with the witnesses that the defense may call in terms of character witnesses. Because there you're testing the basis for their knowledge.

I still have a little bit of a concern about if there's a charge for perjury, we all know it's an indictment. And he's presumed innocent of that charge. And one of the cases that was cited earlier, I think Judge Newman wrote the opinion, it was the case where the prosecution introduced -- asked a question, "Weren't you charged or indicted of this crime?" And the defendant actually had been acquitted. And the analysis was you follow that through to its logical conclusion, and there was no proper inference that could be drawn from the question. So all that was left was sort of the stigma attached with having been charged or indicted when, in fact, the person had been acquitted. Here it's not exactly the same situation, but what I'm concerned about is that its a situation where he's presumed innocent of the charge. And if the point is to be made to the jury he's been indicted, but he's presumed innocent, then what's the point? What's accomplished by incorporating the part about charged with perjury or indicted with perjury other than to leave the stigma?

MR. GLASSER: Well, I think the following, Your Honor. The fact that somebody was found not to be credible or not to have testified

truthfully, the fact, you know, he's a police officer, so just -- well, let me address Your Honor first.

Obviously the rules in the cases -- I think the best case in the Second Circuit, Bagaric, talks about you don't even need charged conduct. It can be something less. Maybe my analysis -- I'm looking at it from a real advocate's point of view. From my perspective, the fact that there's a charge by a grand jury heightens the importance for the value of the misconduct of the defendant in the prior proceeding which is intended to bear on his credibility before the jury under 608(b).

THE COURT: I agree. And that's where my concern is because it's something that heightens, but there's still a presumption of innocence that attaches. And this jury's been told that that's merely a formal accusation. And so I'm concerned about getting in a situation where I now have to explain to them in that regard, well, it's only a formal accusation and all that's left is sort of the stigma. And it's not as if it's the only -- it's not as if that's what's being asked, that's being added on top of the finding of credibility. There is an inquiry and then we're sort of putting this on top as a little premium.

MR. GLASSER: As I read various of the cases, courts have approved inquiries into the fact, "Haven't you been charged with perjury?" I think there were at least two cases in the several that I read where that was allowed.

THE COURT: And it isn't just the inquiry, it's really that almost the effect of it is to bolster the finding of credibility. So what I'm really focusing on it, the additional probative value of the bolstering, as I'm sort of thinking about it, that's where my thinking has just evolved, as opposed to the prejudicial effect of the bolstering and the fact that the jury could be misled about indictment. I don't know where it's going to go.

MR. GLASSER: May I have a moment, Your Honor?

THE COURT: Yes.

(Pause)

THE COURT: You know what my concern is. I'll take a few minutes to think about it.

Let me just also mention in terms of the motion that was filed this morning, I do view the analysis as quite different. As I understand it, there's going to be no tying to this case. And what the witnesses would be asked is the basis for their knowledge.

MR. GLASSER: Correct, Your Honor.

THE COURT: The Michelson case, I believe, asks about an arrest that was 27 years old.

MR. GLASSER: That's correct, Your Honor.

THE COURT: I'm going to finish reading that during the break. I'll give you a heads-up where I'm headed on that. It seems to me the inquiry would be appropriate as to the character witnesses. And as to Mr. Grasser, it seems to me as though that inquiry would also be appropriate.

MR. GLASSER: Thank you.

THE COURT: We'll take our break so the court reporter can at least have a couple minutes.

(Recess)

THE COURT: I have given more thought to this issue in terms of the cross-examination of the defendant. And there's an additional aspect that I have to be sensitive to and that is that highest on my list of priorities is that the question not be tied to this case. If I simply restrict the government into inquiring about being found not credible, I may not leave the government in a position to ask a fair question. If the defendant denies or equivocates, I don't think the government will have been given a fair chance to put before the jury the substance of what it's entitled to put before the jury. I'm thinking in terms of the government can ask the question as to being found not credible, the defendant can give his answer. If, in my judgment, the government is then entitled to ask a follow-up

question, I think the follow-up question would be one where the government would be entitled to inquire as to whether as a result of that testimony the -- or those actions, however it comes out, the defendant was indicted for perjury. So I think that would -- if we break it up that way, I think that would be quite workable and fair to both sides.

MR. GLASSER: I understand, Your Honor. And that's fine as far as the government's concerned. I will not go to the perjury unless there's a denial in response to the first question.

I should alert the Court --

THE COURT: Just to be clear, I'm not -- I wasn't saying just a denial. I think there has to be a fair response.

MR. GLASSER: I understand. I understand. And I take that to mean that can be broader than a denial.

THE COURT: Yes. It has to be a fair response.

MR. GLASSER: I want to make sure --

THE COURT: Or I'll say an accurate response, let me be more precise.

MR. GLASSER: I want to make sure that I understand fully so I don't stray where I'm not

supposed to stray. It would be my intention to lead up to it just a tad, "Did you testify in connection with another court proceeding? Did another party give testimony in connection with that court proceeding and your version of events was found not credible?"

THE COURT: Yes. I assume you can't plop it out with no context.

MR. GLASSER: I want to make sure I have the Court's permission to do it.

MR. McNAMARA: Your Honor -- I'm awfully sorry, Your Honor. I just want to be sure that the record is clear that we've objected to this.

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| UNITED STATES OF AMERICA | : | |
| V. | : | Crim. No. 3:00CR100 (AWT) |
| SALVATORE GALLO | : | |

JURY TRIAL
Volume II

BEFORE:

**HON. ALVIN W. THOMPSON, U.S.D.J.**
and a jury of twelve

APPEARANCES:

FOR THE GOVERNMENT:

OFFICE OF THE UNITED STATES ATTORNEY
157 Church Street
New Haven, Connecticut 06510

FOR THE DEFENDANT:

TIMOTHY F. McNAMARA, ESQ.
102 Oak Street
Hartford, Connecticut 06106

BY MR. GLASSER:

Q. You also had occasion in connection with another proceeding to testify under oath; isn't that correct, Officer Gallo?

A. Yes, sir.

Q. And you testified to a version of events when you testified under oath, correct?

A. Yes, sir.

Q. And the other party testified to a different version of events; isn't that correct, sir?

A. Yes, sir.

Q. And the finder of fact, the judge in connection with that proceeding, didn't credit your version of events, correct?

A. Yes, the motion was denied.

Q. That means your version, what you testified to, was not credited, correct?

A. It means that my attorney said the motion was denied. I believe that's what it means.

Q. Let me ask again. That means your version of events was not credited by the court, correct?

A. I'm not really sure because my attorney said to me that the motion was denied. So, I mean, I assume, yes, that's probably what it means.

MR. GLASSER: May I have a sidebar, Your Honor?

THE COURT: You can ask a follow-up question if you like.

BY MR. GLASSER:

Q. Isn't it a fact, sir, that you were subsequently charged with perjury?

A. Yes.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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| V. | : | Crim. No. 3:00CR100 (AWT) |
| SALVATORE GALLO | : | March 15, 2002 |

**GOVERNMENT'S MOTION TO DISMISS COUNTS ONE AND TWO OF THE INDICTMENT**

On June 3, 1999, a federal grand jury sitting in Bridgeport, Connecticut, returned a one-count Indictment charging Salvatore Gallo (the "defendant"), a Hartford police officer, with violating the civil rights of L.L.G. by forcing her to engage in vaginal and oral sex with him under the threat of arrest in violation of 18 U.S.C. § 242. See United States v. Gallo, 3:99CR111(AWT).

In April 2000, the United States dismissed the June 3, 1999 indictment without prejudice and, on May 3, 2000, the grand jury returned a three-count Indictment against the defendant. The first two counts of the Indictment allege that the defendant

obstructed justice by filing a false affidavit in connection with a suppression hearing held in United States v. Gallo, 3:99CR111(AWT), and subsequently committed perjury while testifying during the hearing in violation of 18 U.S.C. § 1503 and 18 U.S.C. § 1623, respectively. The third count of the Indictment alleged that, on two occasions between approximately September 1996 and February 1997, the defendant deprived L.L.G. of her civil rights in violation of section 242.

In an oral ruling in September 2000, the Court ruled that the defendant would proceed to trial first on the section 242 count.

On October 27, 2000, following a jury trial, the defendant was found guilty on Count Three of the Indictment. On January 11, 2001, the Court sentenced the defendant to 120 months imprisonment and two years of supervised release. The defendant subsequently filed a timely appeal.

Counts One and Two of the Indictment have remained pending.

On February 15, 2002, the United States Court of Appeals for the Second Circuit affirmed the defendant's conviction and sentence. On March 11, 2002, the Second Circuit issued the mandate in the appeal.

In light of the affirmance of the defendant's conviction and sentence and the issuance of the

mandate, to conserve prosecutorial and judicial resources, and in the interests of justice, the Government respectfully requests that the Court dismiss without prejudice Counts One and Two of the Indictment.

Respectfully submitted,

s/_____
JOHN A. DANAHER III
UNITED STATES ATTORNEY

s/_____
JAMES I. GLASSER
ASSISTANT UNITED STATES ATTORNEY

s/_____
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**CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing was forwarded via facsimile and U.S. Mail, First Class, postage prepaid, on this 15TH day of March 2002 to:

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THE HONORABLE ALVIN W. THOMPSON
UNITED STATES DISTRICT JUDGE
UNITED STATES COURTHOUSE
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s/_____
JAMES J. FINNERTY
ASSISTANT UNITED STATES
ATTORNEY

METROPOLITAN DESK | March 26, 2002, Tuesday

# Officer Faces New Charges In Torture Case

By JIM DWYER and WILLIAM K. RASHBAUM (NYT)

A former Brooklyn police officer whose two convictions in the Abner Louima assault case were overturned last month was indicted yesterday on two new charges of perjury.

The indictment of the former officer, Charles Schwarz, was announced by Alan Vinegrad, the interim United States attorney in Brooklyn, who said prosecutors wanted to hold Mr. Schwarz "accountable for corruption of the judicial process."

The president of the Patrolmen's Benevolent Association, Patrick J. Lynch, immediately denounced the new accusations, saying they were part of a "witch hunt."

Mr. Schwarz already faces a retrial on charges that he joined Officer Justin A. Volpe in the attack on Mr. Louima in the bathroom of the 70th Precinct station house on Aug. 9, 1997.

In the development yesterday, a federal grand jury in Brooklyn added to those counts by accusing Mr. Schwarz of falsely testifying that he had not escorted Mr. Louima away from the front desk of the 70th Precinct station house and that he had not

been in the bathroom when Mr. Volpe jammed a stick into Mr. Louima's rectum.

Those statements by Mr. Schwarz are at the core of his claim of innocence, but Mr. Vinegrad, the federal prosecutor who has overseen the case for nearly five years, said they are part of a pattern of lies.

"Many acts of obstruction and lying have permeated this case from the beginning," Mr. Vinegrad said. "The defendant Charles Schwarz's conduct at his own trial was uniquely serious."

One of Mr. Schwarz's lawyers, Diarmuid White, suggested that the charges were brought by the government to improve its position at Mr. Schwarz's next trial, which is scheduled to begin in June.

"It really doesn't change the landscape – the jury is still going to determine the same facts," Mr. White said. "I think they perceive some tactical advantage. Maybe they feel in the eyes of the jury it would discredit Chuck up front."

From his hospital bed, Mr. Louima quickly picked out Mr. Volpe as his chief attacker, but was unable to identify the second of the two police officers he said brutalized him in the station house bathroom. Mr. Louima had been arrested outside a Flatbush nightclub by Officer Volpe, who had been

punched during a melee and mistook Mr. Louima for the culprit.

Mr. Volpe eventually pleaded guilty to attacking Mr. Louima and is serving a sentence of 30 years.

Mr. Louima did provide a clue to the identity of the second officer in the bathroom: he said that man had been the driver of the patrol car. No one disputed that Mr. Schwarz had been the driver.

Two other officers, Eric Turetzky and Mark Schoefield, testified that they saw Mr. Schwarz leading Mr. Louima away from the front desk and toward the station house bathroom. The desk sergeant, Jeffrey Fallon, said he did not see who led Mr. Louima away, but testified that Mr. Schwarz had been at the desk with Mr. Louima, filling out paperwork. Sergeant Fallon said that when he glanced away for a moment, Mr. Louima departed and so did Mr. Schwarz.

For his part, Mr. Schwarz testified that he had not led Mr. Louima away, and said he had not even been in the station house at the time his fellow officers claimed to have seen him walking Mr. Louima toward the bathroom.

The perjury indictment quotes parts of his testimony on this point.

"Did you take him anywhere away from the desk?" Mr. Vinegrad, the prosecutor, asked.

"No," Mr. Schwarz replied.

Asked if he had ever been in the bathroom with Mr. Louima, Mr. Schwarz replied: "Absolutely not."

Mr. Schwarz's claim of innocence was partly bolstered by Mr. Volpe, who said that a different police officer, Thomas Wiese, had accompanied him and Mr. Louima into the bathroom and watched wordlessly during the entire attack.

And Mr. Wiese told investigators a different version. He said that he had indeed gone into the bathroom, but only after the attack on Mr. Louima was over. He said he had been playing with the station house dog outside the bathroom, heard and saw nothing amiss, and did not see Mr. Schwarz.

Mr. Wiese has not testified in any proceedings. He and another former officer, Thomas Bruder, were convicted with Mr. Schwarz on charges that they obstructed a grand jury investigation. Those convictions were overturned by a federal appeals court, which ruled that while the three former officers had attempted to mislead investigators, they had not testified before a grand jury and could not have obstructed its inquiry.

The authorities have not yet said whether they will pursue new charges against Mr. Wiese and Mr. Bruder. Early yesterday, before the grand jury

voted the indictment, Mr. Vinegrad answered questions about the Louima case after delivering a speech on terrorism to the Citizens Crime Commission.

"To my mind, the door remains open to the possibility of other charges of like kind being brought against one or more of the officers, and as I said earlier, that decision has not yet been made," Mr. Vinegrad said.

One of Mr. Louima's lawyers, Peter Neufeld, said the indictment yesterday might alert other former officers – particularly Mr. Wiese, whose testimony might be helpful to Mr. Schwarz – of the perils of perjury.

"It's a warning to Tommy Wiese for the next trial, and other police officers in general, that perjury in support of a cop who breaks the law will no longer be tolerated," Mr. Neufeld said. "Historically, cops believed that they could commit perjury on behalf of their brother officers with impunity. And when cops would testify falsely, even if the target was convicted, they would never be charged. This indictment sends a very strong message that the perjury statute will be vigorously enforced against police officers and not just civilians."

Mr. Wiese's lawyer, Joseph Tacopina, scoffed at Mr. Neufeld's analysis, but he said he was not sure

whether Mr. Wiese would testify at the next trial of Mr. Schwarz, his former patrol partner.

"We have no further legal proceedings of any sort for Mr. Wiese," Mr. Tacopina said. "Until we're invited to the dance, we're not making any decisions at this point about testifying."

Mr. Lynch, the police union president, released a brief statement criticizing the indictment and saying the union was confident Mr. Schwarz will be exonerated.

"It's a disgrace that Chuck Schwarz, who has already spent 33 months in prison for crimes he didn't commit, should be subjected to another vindictive prosecution by the U.S. Attorney for the Eastern District," the statement said.

Mr. Lynch's union last year paid $1.625 million to Mr. Louima to settle civil charges that union officials had helped cover up the attack. It was believed to be the first time a police union has paid a settlement of any amount to the victim of brutality. The union denied any wrongdoing.